Ooi Meng Khin v Amanah Scotts Properties (KL) Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-2368–10 OF 2012 AND W-02(NCC)(W)-2402–10 OF 2012

MOHD HISHAMUDIN, ABDUL AZIZ ABDUL RAHIM AND MOHAMAD ARIFF JJCA

25 JULY 2013

Civil Procedure — Costs — Security for costs — Further security for costs — Whether impecuniosity of appellant alone insufficient ground to order further security for costs — Whether remedy discretionary — Whether party seeking further security for costs should give other party prior notice/demand for same before filing formal application — Whether application should be made at earliest opportunity

The respondents in both the above appeals had filed notices of motion requiring the respective appellants to furnish additional security for costs on the ground they were impecunious. The applications were made pursuant to s 44 of the Courts of Judicature Act 1964 and r 17(1) of the Rules of the Court of Appeal 1994 ('RCA'). The appellants, who were financial officers of the first respondent, Amanah Scotts Properties (KL) Sdn Bhd, were appealing against a decision of the High Court that they each pay RM5m in damages to the respondents for committing negligence and breach of contract in the carrying out of their official duties causing financial loss to the respondents. Whilst conceding that they were impecunious, the appellants opposed the notices of motion on three grounds: (i) that impecuniosity alone was not a ground to order further security for costs as it was a discretionary remedy the court might exercise after taking into account all the circumstances of the case (ii) that prior to the filing of the notices of motion the respondents failed to give the appellants any notice or demand requiring further security for costs and (iii) that the notices of motion were filed more than five months after the appeals were filed and no explanation was given for the inordinate delay. In support of their submissions, the appellants relied upon the Federal Court's decision in *Menon v Abdullah Kutty* [1974] 1 MLJ 130 (*'Menon v Abdullah Kutty'*) which concerned an application for further security for costs — also for the reason that the appellant there was impecunious. The application in that case was made under r 18(1) of the then Federal Court (Civil Appeals) (Transitional) Rules 1963 which was exactly similar to r 17(1) of the RCA.

Held, dismissing the notices of motion with costs:

The court accepted the three grounds advanced by the appellants in dismissing the notices of motion. The Federal Court's decision in *Menon v Abdullah Kutty* was good and binding authority to dismiss the motions on the three grounds (see 20).

[Bahasa Malaysia summary

Responden-responden dalam kedua-dua rayuan di atas telah memfailkan notis-notis usul memerlukan perayu-perayu masing-masing untuk memberikan jaminan tambahan untuk kos atas alasan yang ianya tidak berwang. Permohonan-permohonan dibuat berikutan s 44 Akta Mahkamah Kehakiman 1964 dan k 17(1) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Perayu-perayu, yang adalah pegawai-pegawai kewangan responden pertama, Amanah Scotts Properties (KL) Sdn Bhd, merayu terhadap keputusan Mahkamah Tinggi bahawa setiap mereka membayar RM5 juta dalam ganti rugi kepada responden-responden kerana melakukan kecuaian dan kemungkiran kontrak dalam menjalankan tugas-tugas rasmi mereka yang menyebabkan kerugian kewangan kepada responden-responden. Sementara mengaku yang mereka adalah tak berwang, perayu-perayu menentang notis-notis usul atas tiga alasan: (i) bahawa tak berwang semata-mata bukan alasan untuk memerintahkan jaminan untuk kos selanjutnya kerana ia adalah remedi budi bicara mahkamah yang mungkin akan dilaksanakan selepas mengambil kira kesemua keadaan kes (ii) bahawa sebelum pemfailan notis-notis usul responden gagal untuk memberi kepada perayu-perayu apa-apa notis atau tuntutan yang memerlukan jaminan untuk kos selanjutnya dan (iii) bahawa notis-notis usul difailkan lebih dari lima bulan selepas rayuan-rayuan difailkan dan tiada penjelasan diberikan untuk kelewatan terlampau. Dalam menyokong penghujahan mereka, perayu-perayu bergantung kepada keputusan Mahkamah Persekutuan dalam kes *Menon v Abdullah Kutty* [1974] 1 MLJ 130 (*'Menon v Abdullah Kutty'*) yang berkenaan permohonan untuk jaminan untuk kos selanjutnya — juga untuk sebab perayu dalam kes tersebut tak berwang. Permohonan dalam kes tersebut dibuat di bawah k 18(1) Federal Court (Civil Appeals) (Transitional) Rules 1963 terdahulu yang mana hampir sama kepada k 17(1) KMR.

Diputuskan, menolak notis-notis usul dengan kos:
Mahkamah menerima tiga alasan yang dikemukakan oleh perayu-perayu dalam menolak notis-notis usul. Keputusan Mahkamah Persekutuan dalam kes *Menon v Abdullah Kutty* adalah betul dan kuasa mengikat untuk menolak usul-usul tersebut atas ketiga-tiga alasan tersebut (lihat perenggan 20).]

Notes

For cases on security for costs, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2414–2457.

Cases referred to

Menon v Abdullah Kutty [1974] 1 MLJ 130, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 44
Rules of the Court of Appeal 1994 r 17(1)

Appeal from: Civil Suit No D-22NCC-2392 of 2010 (High Court, Kuala Lumpur)

Chan Kok Keong (Yap Jyy Huey with him) (Shook Lin & Bok) for the applicant/respondent.
Balvinder Singh (Balvinder Singh Kenth) for the appellant.
Lee Pak Keong in person.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] The following two appeals, namely:

(a) Civil Appeal W-02(NCC)(W)-2368–10 of 2012; and

(b) Civil Appeal W-02(NCC)(W)-2402–10 of 2012,

are scheduled to be heard together before the Court of Appeal. The hearing date is yet to be fixed.

[2] In the meantime, however, there are two notices of motion that need to be heard, namely:

(a) encl 10a (under Civil Appeal W-02(NCC)(W)-2368–10 of 2012); and

(b) encl 11a (under Civil Appeal W-02(NCC)(W)-2402–10 of 2012).

[3] These notices of motions are the respondents' applications for further security for costs of the appeals.

[4] By consent of the parties, these motions were heard together on 19 April 2013. We have reserved judgment.

[5] And, now, we deliver our judgment.

[6] These notices of motion are made pursuant to s 44 of the Courts of Judicature Act 1964 and r 17(1) of the Rules of the Court of Appeal 1994.

[7] Section 44 of the Courts of Judicature Act 1964 provides:

Incidental directions and interim orders

44(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(1) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(2) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[8] Rule 17(1) reads:

Entry of appeal

17(1) Notices of appeal may be given by filing within the time limited for bringing the appeal four copies of the notice of appeal in the Registry of the High Court at the place where the judgment, order or decision complained of was made or given by paying the prescribed fee and by lodging in Court at the same time the sum of five hundred ringgit as security for the costs of the appeal:

Provided that the Court may at any time, in any case where it thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matter in question in the appeal:

Provided further that no deposit by way of security for costs shall be required if the appeal is brought by the Government of Malaysia or any State Government.

[9] As to the background facts, the appellant in Civil Appeal W-02(NCC)(W)-2368–10 of 2012 (Ooi Meng Khin) and the appellant in Civil Appeal W-02(NCC)(W)-2402–10 of 2012 (Lee Pak Keong) were the financial controller and the deputy financial controller, respectively, of the first respondent (the first plaintiff before the High Court). The respondents sued the appellants for negligence and breach of contract, alleging that the appellants, by reason of their negligence in carrying out their duties as financial officers of the respondents, and in breach of their contract of employment with the first appellant, had enabled the third defendant (Tee Poh Kun) to defraud the respondents thereby causing financial loss to the respondents. Each of them was ordered to pay damages in the sum of RM5m to the respondents.

[10] Dissatisfied with the decision of the High Court, the appellants have appealed to the Court of Appeal.

[11] There is only one ground advanced by the applicants/respondents for the applications for security for costs: the impecuniosity of the appellants.

[12] To support their applications, the respondents rely on the *English Supreme Court Practice* 1997 Vol 1 Pt 1 para 59/10/20, that states:

> 59/19/20
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> Insolvency or impecuniosity — It is the settled practice to require security for costs to be given by an appellant who would be unable through impecuniosity to pay the costs of the appeal, if unsuccessful, without proof of any other special circumstances (*Harlock v Ashberry* (1881) 19 Ch D 84; *Hall v Snowdon & Co* [1899] 1 Q B 593; *Re Spencer* (1881) 45 LT 396).

[13] The appellants, on their part, admit their impecuniousness; but resist the applications on three grounds.

[14] Firstly, it is contended that in Malaysia the position is that, although impecuniosity can be a ground to order an appellant to furnish security for costs, still, the court must also consider other circumstances in exercising its discretion.

[15] Secondly, it is pointed out that prior to the filing of the notices of motion, no notice for security for costs had been served on the appellants. It is contended that prior giving of notice is a mandatory prerequisite.

[16] Thirdly, there was inordinate delay in the applications for security for costs.

[17] In support of their submissions, the appellants cite the Federal Court decision of *Menon v Abdullah Kutty* [1974] 1 MLJ 130 (the panel comprising Azmi LP, Ali FJ and Raja Azlan Shah FJ).

[18] It is not disputed that, prior to the filing of the notices of motion, there have been no notice served on the appellants demanding security for costs.

[19] It is also not disputed that there has been a considerable delay in the filing of the notices of motion. The decision of the High Court against the appellants was given on 30 August 2012. The notices of appeal were filed on 26 September 2012. But the notices of motion were only filed on 1 March 2013. Thus, calculating from the date of the filing of the notices of appeal, there was a delay of more than five months in filing the notices of motion. The respondents have not given any explanation for this long delay.

[20] In our judgment, on the facts, we accept the three grounds submitted by the appellants in urging us to dismiss the motions as being valid grounds. Whatever may have been the law and practice in the United Kingdom, we, on our part, however, accept *Menon v Abdullah Kutty* as good and binding authority to dismiss the motions on the said three grounds. This case, cited by the appellants, concerned an application for further security for costs made under r 18(1) of the Federal Court (Civil Appeals) (Transitional) Rules 1963. Rule 18(1) provides:

> Entry of appeal
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> 18(1) Notices of appeal may be given by filing within the time limited for bringing the appeal four copies of the notice of appeal in the Registry of the High Court at the place where the judgment, order or decision complained of was made or given by paying the prescribed fee and by lodging in Court at the same time the sum of five hundred ringgit as security for the costs of the appeal:
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> Provided that the Court may at any time, in any case where it thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matter in question in the appeal:
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> Provided further that no deposit by way of security for costs shall be required if the appeal is brought by the Government of Malaysia or any State Government.

(These transitional 1963 Rules of the Federal Court were subsequently replaced by the Rules of the Federal Court 1980 vide PU(A) 33/1980, that came into force on 1 June 1980.) It is pertinent to note that the provisions of this r 18(1) are exactly similar as the provisions in r 17(1) of the present Rules of the Court of Appeal. The reason for the application for further security for costs in this case cited is the same as in the present case, that is to say, the impecuniosity of the appellant. In *Menon v Abdullah Kutty*, Raja Azlan Shah FJ (as he then was) in delivering the judgment of the Federal Court said:

> Rule 18(1) of the Federal Court (Civil Appeals) (Transitional) Rules 1963 gives this court a discretion to order further security for costs of an appeal 'at any time, in any case where it thinks fit', Thus this is a discretionary remedy to be exercised in accordance with well known principles. This court is not bound by any hard and fast rules, but has to look at all the circumstances of the case (see *Abu bin Mohamed v Voo Fui Tong & Anor* [1938] 1 MLJ 140).
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> Poverty of the defendant is a ground to increase the security for costs but where it exists, the court must consider other circumstances, whether in a particular case it will order further security to be given. As was said by Lord Usher, MR in *Hood Bans v Heriot* which as quoted by Home J in *Abu bin Mohamed*'s case:

A All that this court has ever held is that poverty or inability to pay is a special circumstances, and, where it exists the court must consider whether in the particular case it will order security to be given. The court is not bound in such a case to order security to be given. It has a discretion in the matter which it has exercised on many occasions.

B The matter is therefore a question of discretion for the court.

It may well be that the defendant is in a state of doubtful solvency. But the matter must be resolved at the earliest opportunity, ie when the notice of appeal was given. Beyond saying in his affidavit that the defendant has appealed the respondent for some inexplicable reason has not disclosed the date the notice of appeal was given. C A perusal of the court registry file reveals 4 September 1973 was the date, that is some eight days after judgment was delivered.

In ordinary circumstances the respondent ought to confront the defendant by letter to give security. If there is no adequate response, then the respondent may apply to court. D In this case the matter was first raised at the time when an application for stay was made, that is 26 days after lodging the notice of appeal. The application for further security was made on 10 October 1973, that is 14 days after the matter was first raised in court, and 40 days after lodging of notice of appeal.

Having regard to all the circumstances of the case, I feel this is not a fit case to order E further security for costs of the appeal. There was no prior demand for security and the motion was not made at the earliest opportunity.

[21] Accordingly, the notices of motions are dismissed with costs.

F *Notices of motions dismissed with costs.*

Reported by Ashok Kumar

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